

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  MCLEODUSA TELECOMMUNICATIONS SERVICE, INC.,  Complainant,  v.  U S WEST COMMUNICATIONS, INC.,  Respondent.	DOCKET NO. FCU-99-5
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**FINAL DECISION AND ORDER**

(Issued February 21, 2000)

On November 23, 1999, McLeodUSA Telecommunications Services, Inc. (McLeod), filed a complaint pursuant to Iowa Code § 476.101(8) (1999) against U S WEST Communications, Inc. (U S West). The Board docketed the complaint on December 6, 1999, and established a procedural schedule consistent with the 90-day time period allowed by Iowa Code § 476.101(8). The procedural schedule provided for pre-filed direct testimony and exhibits and a hearing for the purpose of cross-examination of the pre-filed testimony.

After the direct testimony was filed, it appeared there were no material issues of disputed fact to be resolved at hearing. Board staff convened a conference call with counsel for the parties, who agreed that a hearing in this docket was

unnecessary. Counsel for the parties waived cross-examination of the witnesses and stipulated that the prefiled testimony would be spread on the record as if given at hearing. Based on this waiver and stipulation, on January 10, 2000, the Board issued an order canceling the hearing and revising the briefing schedule.

### **SUMMARY OF COMPLAINT**

McLeod alleges U S West engaged in prohibited and anti-competitive acts and violated the interconnection agreement between McLeod and U S West when U S West gave preferential treatment to its own retail division and provided service directly to a retail customer before the projected installation date conveyed to McLeod. McLeod seeks an order requiring U S West to relinquish the Polar Ice contract to McLeod, prohibiting U S West from engaging in similar conduct in the future, and imposing civil penalties. (Complaint at page 4.) At a later stage of the proceedings, after discovery, McLeod also requested an order establishing a schedule of penalties for any possible future misconduct by U S West.

### **SUMMARY OF FACTS**

The relevant facts may be summarized as follows: Polar Ice signed a service agreement with McLeod on August 8, 1999, for ten lines to a construction trailer at a Cedar Rapids ice arena owned by Polar Ice. (Lennox<sup>1</sup>, p. 2.) McLeod intended to provide service through resale of U S West's Centrex Plus service. (Id.) McLeod submitted an order to U S West by facsimile on August 25, 1999, stating that the

service was to be provided at a construction trailer and supplying information concerning nearby U S West facilities. (Lennox, p. 3.) U S West acknowledged receipt of the order by sending McLeod a firm order commitment (FOC) indicating the service would be installed on September 10, 1999. (Id.)

When U S West entered the McLeod order into its own systems, U S West made a mistake. The information that the order was for a construction trailer and the nearby facility information was erroneously omitted when U S West typed the order into its service order processor. (Schumacher<sup>2</sup>, p. 6.) The result was that when the U S West personnel responsible for the installation reviewed the order, they mistakenly believed the lines were to be installed at the adjacent ice arena, rather than the trailer. (Id.)

On September 10, U S West notified McLeod that a “facilities hold” had been placed on the order because an F2 distribution pair was needed to complete the installation. (Lennox, p. 3.) On September 13, 1999, U S West notified McLeod that the service would be installed the third week of October 1999. (Lennox, p. 4.) McLeod conveyed that information to Polar Ice. (Id.)

On September 28, 1999, U S West notified McLeod that the order had been placed on a different facilities hold because the customer would have to install conduit before U S West could install service. McLeod again conveyed the information to Polar Ice. (Lennox, p. 5.) McLeod then contacted U S West to remind

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<sup>1</sup> Testimony of Thomas A. Lennox, McLeod Sales Manager, at page 2.

U S West that the service location was a construction trailer and conduit was not required. U S West indicated it would look into the matter and respond. (Lennox, p. 6.) On October 8, 1999, U S West informed McLeod that an engineer would perform an on-site analysis the following week. (Id.) However, the following week McLeod learned that U S West had already installed its own retail service directly to the customer. (Id.)

Apparently frustrated with the delay in getting service from McLeod, Polar Ice contacted U S West directly on September 27, 1999. During that call, Polar Ice was advised U S West could install service as early as October 4, 1999. (Id.) On either September 28 or 29, U S West told Polar Ice that service would be delayed beyond October 4<sup>th</sup>, and on October 4 U S West told Polar Ice that service would be delayed until conduit was installed to the ice arena. Polar Ice responded that the service was for the construction trailer, rather than the arena, and U S West scheduled a technician for a field visit in the next day or two. Following the on-site review, U S West installed its own service lines on October 11 and 12, 1999. (Lennox, p. 7.)

McLeod's complaint is focussed on the apparent ability of U S West's retail unit to arrange for a site visit by a technician within 48 hours, while U S West's "Held Order Group," which processes held orders for resellers, took more than a week to respond to McLeod before even beginning to discuss scheduling a site visit. (McLeod Initial Brief at page 5.) McLeod complains that this difference in

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<sup>2</sup> Testimony of Wendy G. Schumacher, U S West Team Leader – Wholesale Service Delivery, at page 6.

responsiveness caused McLeod to lose the customer and is a violation of Iowa Code §§ 476.100(1), (2), (3), and (7) (1999), 47 C.F.R. § 51.603(b), and section 9.11 of the U S West-McLeod interconnection agreement.

### **ANALYSIS**

U S West admits it made a mistake when it re-typed the McLeod service order into U S West's service order processing system. U S West erroneously left off the "comments" section of the McLeod order, which described the location as a construction trailer and gave the necessary "nearby" information. The Board believes that the events leading to this complaint would never have happened if U S West had not made this clerical error. The clerical error was then compounded when U S West's retail division was able to arrange for a technician visit in a shorter time frame than U S West's wholesale division, with the end result that U S West was able to offer the customer retail service faster than it responded to McLeod's order for wholesale service to the same customer.

On the basis of these findings, the Board concludes that U S West has violated Iowa Code §§ 476.100(1), (2), (3), and (7). Section 476.100(1) prohibits a local exchange carrier like U S West from discriminating against another provider by refusing or delaying access to U S West's services; clearly, U S West delayed McLeod's access to U S West services in a discriminatory manner.

Section 476.100(2) prohibits a local exchange carrier, including U S West, from discriminating against other providers by providing access to essential facilities

on terms and conditions less favorable than it provides to itself and its affiliates. U S West violated this prohibition when it failed to give McLeod the same level of service through U S West's wholesale division as U S West offered to its own retail division.

Section 476.100(3) prohibits a local exchange carrier like U S West from degrading the quality of service provided to another provider. U S West violated this statute when it failed to accurately enter all of the relevant information from McLeod's order into U S West's own systems.

Finally, § 476.100(7) prohibits a local exchange carrier like U S West from discriminating in favor of itself or an affiliate in the provision of any telephone service. Again, U S West violated this statute when it failed to give McLeod the same level of service it provided to its own retail division.

The remaining issue is determining the appropriate remedy for the U S West error, if a remedy is appropriate at all. McLeod's requested relief will be examined item-by-item.

**1. Transfer the customer to McLeod**

McLeod asks that U S West be required to relinquish the Polar Ice contract to McLeod. U S West states that it does not have a contract with Polar Ice and the customer is free to change to McLeod's service at any time. (U S West Reply Br. at p. 2.) Further, the record contains no information regarding the customer's preference at this time. If the customer does not want to be switched to McLeod's service, then an order re-assigning the customer to McLeod could be considered

Board-ordered slamming. Without some expression of the customer's choice of local service provider, the Board will not order a change of service providers. However, the Board will order U S West to take steps to ensure the customer is aware of its options.

The Board will require U S West inform Polar Ice that it may change to McLeod's service, if desired, at no charge to Polar Ice. If there are any costs associated with the change, U S West will be required to pay them.

**2. Issuance of a Board order finding U S West did not provide service in a competitively neutral manner and directing U S West to changes its practices regarding held orders**

The Board has found that U S West made a mistake and that the result was a failure on U S West's part to provide service in a competitively neutral manner, in violation of the statutes described above. However, there is nothing in this record to indicate whether U S West's actions were the result of a simple mistake that is unlikely to be repeated or, instead, a practice that U S West should be required to change. In the absence of evidence that this is part of a regular U S West practice, this is not an inappropriate case for ordering sweeping changes in U S West's practices. If more complaints are filed and show that U S West's practices regarding held orders are having discriminatory results, then it may be appropriate for the Board to order broad relief in the future, but this is the first case alleging this form of discrimination and it would be premature to order sweeping changes on the basis of what may be an isolated event.

Thus, the Board is issuing this order finding that U S West's admitted mistake resulted in a failure to provide service in a competitively neutral manner. This order may form part of the basis for ordering broader relief in the future, if subsequent complaints establish that the discrimination is the result of U S West's practices, rather than an isolated mistake. It will also give U S West notice for purposes of Iowa Code § 476.51, discussed below.

### **3. Imposing civil penalties on U S West**

McLeod asks the Board to assess civil penalties against U S West, pursuant to Iowa Code § 476.51. However, the statute authorizes the Board to levy civil penalties only after written notice to the utility of a specific violation, followed by a repeat violation of the same statute, rule, or order. No such notice has been issued with respect to U S West's violation of the various provisions of Iowa Code § 476.100, so civil penalties are not an option available to the Board at this time.

With this order, the Board is giving U S West written notice of its violations so that if the same statutes are violated in the future the Board will have the ability to levy civil penalties, if appropriate. The Board will give U S West 30 days to review its wholesale order entry system and its process for scheduling technician visits for held orders and correct any discriminatory differences between the treatment of U S West's retail division and its wholesale customers. If U S West fails to achieve compliance with the statutes and this order after that time period, U S West may be subject to civil penalties for any further violations.



**4.     Compensating McLeod for lost revenues**

At an early stage of these proceedings, McLeod asked the Board to compensate it for lost revenues associated with the Polar Ice account. (Complaint, p. 4.) McLeod has not identified any legal authority supporting the claim that the Board has the power to order payment of damages, and in its briefs McLeod does not re-assert its claim to damages. Further, no evidence has been offered concerning the amount of any alleged damages. On this record, the Board finds that McLeod has waived or withdrawn its claim for damages, based upon its failure to argue the point in its briefs and its failure to offer any evidence concerning the amount of any alleged damages.

**5.     Adopting a system of performance measurements requiring U S West to compensate McLeod whenever U S West fails to provide adequate service**

The last requested relief, setting up a system of wholesale performance measurements with preset penalties for noncompliance, will be denied. If McLeod wishes to impose a performance measurement and penalty system on U S West as a part of the existing interconnection agreement between them, it would be better to do so in the context of the interconnection agreement itself.

**CONCLUSION**

The Board finds that U S West failed to act in a competitively neutral manner, violating Iowa Code §§ 476.100(1), (2), (3), and (4), when U S West failed to accurately enter all of McLeod's order information into U S West's systems and when

U S West failed to schedule a technician site visit as quickly for a wholesale held order as it did for a retail held order for the same customer. The Board will order U S West to notify Polar Ice that, if it wants, Polar Ice may switch its local service to McLeod at any time and U S West will pay any and all costs associated with making that switch. The Board will give U S West notice of its statutory violations for purposes of possible civil penalties pursuant to Iowa Code § 476.51, if further violations occur, and the Board will deny McLeod's other requests for relief. McLeod has failed to prove that any other relief is necessary or appropriate in this proceeding.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. U S West is hereby notified, for purposes of Iowa Code § 476.51, that its actions as described in the record of this proceeding are anticompetitive and in violation of Iowa Code §§ 476.100(1), (2), (3), and (4). Specifically, U S West failed to accurately enter all of McLeod's order information into U S West's systems and U S West failed to schedule a technician site visit as quickly for a wholesale held order as it did for a retail held order for the same customer, resulting in a violation of U S West's general duty to conduct itself in a competitively neutral manner. U S West shall have 30 days to review its wholesale order entry system and its process for scheduling technician visits for held orders and correct any discriminatory differences between the treatment of U S West's retail division and its wholesale

customers. If U S West fails to achieve compliance with the statutes and this order after that time period, U S West may be subject to civil penalties for any further violations.

2. U S West shall, within 15 days of the date of this order, notify Polar Ice that Polar Ice has the option of switching its local service to McLeod at any time and that U S West will pay any and all costs associated with making that switch.

3. All other requests for relief in this docket are denied.

**UTILITIES BOARD**

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary, Deputy

/s/ Diane Munns

Dated at Des Moines, Iowa, this 21<sup>st</sup> day of February, 2000.